*No. 2924.*

—IN THE—

# United States Circuit Court of Appeals

—FOR THE—

# Ninth Circuit

ISABELLE GARWOOD,
*Plaintiff in Error,*
*vs.*
JOSEPH SCHEIBER and MORRIS SCHEIBER and JOHN SCHEIBER,
*Defendants in Error.*

## SECOND REPLY BRIEF ON BEHALF OF DEFENDANTS IN ERROR

By A. H. HEWITT

*Filed this .....day of March, A. D. 1917.*

*FRANK D. MONCKTON, Clerk.*

*By .....Deputy Clerk.*

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## Second Reply Brief on Behalf of Defendants in Error

When this case was orally argued before this Court on the 7th day of March, counsel for plaintiff in error obtained permission from the Court to file a reply brief, and counsel for defendants in error was likewise granted the privilege, if he so desired, of filing a second reply brief.

While, on general principles, we do not deem it necessary to make an answer to the reply brief of plaintiff in error, yet we do not feel that we would be treating our clients or this Court right if we let pass unchallenged some of the statements made by counsel in his reply.

The whole argument of counsel seems to be based upon the idea that this Court should review the evidence and determine therefrom that the evidence given by plaintiff and her witnesses was true and that the evidence given by the defendants and their witnesses was false. In other words, he would have this Court reverse the conclusions and judgment of the trial court, notwithstanding a conflict in the evidence.

While the stipulation shown on page 58 of the transcript prevents us from raising the point that because the questions of fact were determined by the court without a jury, no ruling made upon or in connection with the trial can be reviewed by the court of appeals, yet it does not prevent us from showing that the conclusions and decision of the trial court should not be set aside upon conflicting evidence.

There was a conflict in the evidence upon every material issue raised by the pleadings in this case and the trial court found against the plaintiff and gave judgment for the defendants. In the absence of findings this judgment is conclusive unless there be manifest error in the record, and certainly the duty of pointing out such error, if any, devolves upon the appellant. This she has not done. As stated in our oral argument, there are seven errors complained of by plaintiff,

and she asserts that they are errors because the land was sold by the acre instead of in gross.

Practically all the evidence given in favor of plaintiff on the question of a sale by the acre was given by herself. The evidence showing that the sale was en masse is set forth at page 80 of our first reply brief and it is unnecessary to refer to it again.

We have been unable to find anything either in the opening or reply briefs of plaintiff which points out how or in what manner the trial court committed error in any of the seven rulings to which the plaintiff took exceptions. Instead of presenting an argument on these alleged errors she has urged unfairness and misrepresentation as the basis for a reversal of the judgment of the lower court. Because every acre of the 609.9 acres which she acquired was not worth $125.00 per acre she claims she was damaged by the transaction. That might be the case if she had been told that fact and had made no personal investigation of the premises herself. She was never told anything of the kind. She did know all about the land between the old levee and the river for she asked about a market for wood; she was asked to go up on the levee where she could have seen the premises to better advantage but she declind. Surely, if defendants were endeavoring to conceal the condition of the land over the levee she would not have been requested to look at it. Several of the witnesses testified that the condition of the land over the levee could be seen from the road along the levee, which plaintiff passed over two or three times while inspecting the ranch and before she decided to purchase the

place. To assert that she was deceived as to the extent of the usable land should be unavailing considering what was told her and what she saw.

We will here note some of the errors made by counsel for plaintiff in his reply brief:

On page one he says: "* * They (defendants) positively knew that there were only 450 acres of usable land to the tract, and they knew that plaintiff was going away with the impression that she was getting 600 acres of good land." This is a statement of counsel not borne out by the evidence. The plaintiff certainly knew that the defendants were not making her a gift of the wood land.

Again on page two of his reply brief he states: "That the defendants knew that this large percentage of land (referring to the land west of the levee) had been lost, and that the tract no longer contained the 600 acres which the old deed called for." As we stated in our first reply brief, the land had not been lost nor was it under a navigable stream (see pages 82 and 83 of our first reply brief. Again on page two counsel states that they (defendants) bought the land for $27,000, and 450 goes into 27,000 just 60 times. The deed executed to them called for 600 acres, more or less, and counsel might have said that 600 goes into 27,000 just 45 times. We are unable to see that these assertions show that the trial court committed error.

In several places the defendants are charged with knowingly letting plaintiff leave the ranch with wrong ideas. Just how the defendants knew this does not appear from the evidence. Morris

Scheiber testified that she knew perfectly well that the line went to the river. She ought to have known it after having been told several times by all three of the defendants.

At page four of plaintiff's reply brief counsel would have the Court believe that the property sold to plaintiff by defendants cost them but $27,000. This statement is somewhat misleading but we will be charitable and say that he probably overlooked the matter of improvements which defendants placed upon the property after they bought it and prior to the sale to plaintiff, costing between fifteen and eighteen thousand dollars (see pages 359 and 361 of Trans.). The statement of counsel that according to the testimony of the witnesses Wessing, Thompson and Zimmerman, there was no change in land values between the time that defendants acquired the land and the time they sold is again misleading for on examination of the testimony of these witnesses at the pages cited the Court will observe that there was a marked advance in value after the reclamation works were started.

Again on page four of the reply brief he states that we have misstated the testimony of the witness Brown. We stand by our statement. On the same page that counsel cites, Brown said, in reply to a question as to whether the land was sold as a whole or by the acre: "Well, it was to be sold as a total, providing they took the stock." It is quite evident that he was referring to the conversation with Miss Garwood. The ingenuity of counsel will not change the record.

At page five of the reply brief counsel again insists that his client did not get 600 acres of

land, and he states: "We know that there is an actual shortage of sixty acres by the positive and undisputed testimony of Mulvany." This statement is somewhat extravagant in its nature, considering the fact that Von Geldern, the engineer, testified (page 303 of Trans.) as follows· "I surveyed the Scheiber ranch July 12th of this year. I knew the original boundaries of that ranch from previous surveys that I have made in that territory, but I based the work of this survey on the description furnished from the suit to quiet title, and followed out the description on the ground, and found it to coincide with the lines as I knew them to be. The lines were exactly as pointed out by the Scheiber Brothers. I wish to correct my statement, as to knowing about one particular line in the bottom line, I was not familiar with that one line, but that holds good as far as the others are concerned; all these lines were also shown me by the Scheiber Brothers and Mr. Zimmerman. I don't know where Mr. Zimmerman resided, but I think he lives in that locality somewhere. I know that he has lived there some years ago. Yes, I made a map of my survey. Yes, the map which you show me is a correct map of the place, as surveyed by me. (At this point the said map is introduced in evidence, and marked Defendants' Exhibit "I.") When I was there surveying, I took elevations of of the land between the two levees close to the new levee, so-called; I took elevations of the land between the new cut of the Feather River and the old Feather River channel. In seeking those elevations, I did not use any regular datum. In order to facilitate matters I assumed the datum and made everything in direct comparison to

that datum. I used the elevation of the water in the river at that time as the base of starting point of that assumption. At that date, the water in the river was not at its lowest stage, it was about three feet above the water mark at that time. I found the land close to the cut, or that portion of the land between the the two levees close to the cut to be about 14 feet higher than the water in the river I just gave you the elevation, the difference between them, the elevation of the old channel, the difference in elevation between the bed of the old channel and the river was 12 feet; it averaged 12 feet pretty well all over the channel. It was 12 feet higher than the stage of the water at that time. I found 609.9 acres within the boundaries of the entire tract."

This testimony as to the acreage in the ranch is certainly more reliable than the testimony of Mulvany, who admitted that he had not been across the artificial cut for 25 years prior to the trial (see page 153). He explains that he could not get there because the land had washed away; it was in the bottom of the river. This statement is disproved by the testimony of the engineer who states that he *"followed out the description on the ground."* when he made his survey, and the ground was from 12 to 14 feet higher than the bottom of the river and the water in the river was three feet above low water mark.

Now let us examine the record and note what the "positive and undisputed" testimony of Mulvany was. At page 148 of the transcript this witness said:

"The artificial channel, of which you speak,

was commenced and completed in 1913. Previous to 1913 the main body of the river went around the bend, and when the river was high it went across the bend through the timber, all over it. Since 1891, or 1890, there had been for a number of years an old levee to the east of the cut-off. When the cut-off was made, they put in additional levees and strengthened the old ones. In 1911 during high water, the water spread all over the land outside of the old levee. In high water the boat went straight down instead of around the bend. In low water the boat was compelled to go around. I do not suppose that in low-water times there was any water where the artificial channel is now. I have not been there those times; I have not been on the ground. During all the time the water was high, the water was there in that channel."

From this portion of the testimony of this witness, so "positive and undisputed," it appears that before plaintiff bought the ranch and for two years afterwards the river ran *around the bend* in the old channel in the summer time and the boats at that season followed the channel around the bend. This bend is shown on the map of the engineer, Von Geldern, and is marked "old channel (now filled up)" (Defendants' Exhibit I). If the boats, as witness states, went around that bend in 1911, it is quite evident that the river forming the western boundary of the ranch ran around the bend and that there was not a shortage of sixty or seventy acres, and no such portion of the ranch was located under a navigable stream. There was no dispute but that in high water the river covered the entire ranch

west of the levee at the time the place was purchased by plaintiff, but in low water the river ran around the bend as stated by plaintiff's witness.

The land, however, was not sold by the acre and evidently the trial court so concluded, and its conclusion was justified from the evidence (see page 80 and 81 of our first reply brief).

At page six of counsel's reply brief he objects to a statement made in our first reply brief to the effect that the agent of Miss Garwood was shown the entire ranch, and he states that there is no such testimony in the record. It will be recalled that Miss Garwood, Dr. Ramos and Dike visited the ranch and they went over it together. The testimony of Dike at pages 260, 261 and 262 of the Transcript not only shows that the agent of Miss Garwood, Dr. Ramos, was shown the entire ranch but that Miss Garwood likewise was shown the entire ranch.

Again at page seven of plaintiff's reply brief, her counsel tries to make it appear that defendants permitted her to leave the ranch under a misconception as to the true boundaries. She was certainly told times enough that the river was the western boundary to remove any question of misconception from the minds of the defendants. Counsel has tried to explain the "green line" part of the plaintiff's testimony by saying it was the tops of the trees on the far side of the levee. We wonder what part of the record he examined for this statement. In the complaint of plaintiff (Trans. page 6) she avers that Morris Scheiber pointed to the levee and told her that it was the boundary. In plaintiff's opening brief

her counsel asserts that the levee was pointed out to her as the line. We again call the attention of the Court to the testimony of plaintiff on this point, found at page 169 of the Transcript. It is as follows:

Q. Now, what conversation did you have with any one of the Scheiber men, the Scheiber Bros.? A. Well, I had no idea of buying the ranch, I was trying to entertain them, and I said, "Where is this land?" and they pointed at the levee and they said "along that green line"—

Q. Do you remember which one of the brothers that was? A. I think it was Morris, the little one. Right along that green line to the white house. And I said "what green line?" and they made it more explicit and they said "Down that fence to those trees and across those trees, from the lower fence up to that grove." That is the only description I ever heard of the property in my life.

Q. What did he indicate when he said "along that green line?"

A. The levee. Q. He pointed to the levee? A. He pointed to the levee, to the white house, which was a stable.

Q. Is that the only description which he gave you? A. That is the only description I ever had of the land.

Now, counsel for plaintiff, came forward with an explanation of the "green line," and from his own imagination and not from the record affirms that it was the tops of the trees on the far side of the levee. He has not explained nor can he ex-

plain to the advantage of his client her state ment that she was told the boundary went down that fence to those trees and *across* those trees from the *lower fence* up to that grove. The lower fence, without any doubt, was the fence on the south side of the ranch as the river runs southerly. Counsel states, and evidently wishes this Court to take his statement as a fact to be considered in the case, that the trees referred to by plaintiff were located at the easterly side of the ranch. There is no evidence before the Court showing that there are trees at the east side of the ranch. Defendants were pointing toward the levee when they made the boundary "more expicit," and there was no evidence showing that a levee existed on the east side of the ranch. Counsel's explanation of the damaging admission of his client does not explain.

Again on page 8 of counsel's reply brief he wishes this Court to understand that the invitation extended to Miss Garwood to walk up on the levee was for the purpose of enabling her to see the country—some enchanting view, probably. He forgot the testimony of Dike, one of the witnesses for plaintiff, found at page 262 of the Transcript, which was as follows:

Int. No. 11n. Did you have any conversation with Miss Garwood on any of these visits to the ranch, if such visits were made, about the timber between the levee and the river and if so what was that conversation? A. I did. As we were just inside the levee I invited Miss Garwood to step on top of the levee that I might show her the timber land between the levee and the river, but she remarked that she could see it from the

machine and that she did not care to climb up the side of the levee.

Int. No. 11o. In any of the visits to the ranch with Miss Garwood, did you go or drive near the levee, and if so for what distance? A. We drove along the foot of the levee I think each time we visited the ranch for almost the entire width of the west end of the ranch.

Int. No. 11p. When you visited the ranch with Miss Garwood, if you did so visit it, from what point did you approach it and what course did you follow after reaching it? A. Sometimes we would enter the ranch from the east side, other times from the northwest corner at the foot of the levee and from this point we would continue either along the roads leading through the ranch or through the fields, both of which courses were taken frequently.

Int. No. 11q. In any of these visits to the ranch made by you and Miss Garwood, if such visits were made, did you point out to her the boundaries of the ranch and if so what did you mention as the boundaries? A. We did point out the boundaries and mentioned certain fences which constituted the southeast and north boundaries and the river bank representing the west boundary.

Plaintiff endeavors to make it appear that the reason of her refusal to go up on the levee was because of a sore ankle, although the Scheiber boys said she walked about the buildings and looked at the stock. Even if her ankle was sore she was informed by the invitation of Dike that there was timber land over the levee and every

opportunity was given her to see it or to make inquiries concerning it. Over and over again she was told that the river was one of the boundaries of the ranch, and if she did not have interest enough herself to ascertain how far away it was, certainly no duty devolved upon defendants to give her the exact measurements. One thing is evident, nothing was concealed and no deceit was practiced.

At page ten of the reply brief, plaintiff's counsel tries to make it appear that when Dike said he pointed out the boundaries and used the term "river bank" he meant the levee. This is another imagination of counsel. Counsel makes the further statement, not gathered from the evidence, however, that there is no bank to the actual edge of the water. The surveyor, Von Geldern, found banks from 12 to 14 feet high with the river three feet above low water. Counsel refers to the photograph exhibits. We have looked at them several times but we are unable to see that they prove anything different that what was brought out by oral testimony. The one where water is shown is a picture of a "swimming pool in the river," (see page 133 of Trans.).

Again at page eleven of plaintiff's reply brief, counsel again makes the assertion that plaintiff never knew that the tract extended to the west side of he levee. She was told many times that it did and there was no doubt but that she knew it. Why did she ask if there was any market for wood? There was no evidence that there was any timber on the east side of the levee.

We have already covered the question of the

valuation of this ranch at the time it was purchased by plaintiff in our first reply brief and it is unnecessary to discuss it further here. Evidently, as some of the witnesses stated, there was a great change in the market value of land in that vicinity after the reclamation district was formed. It will be observed by the Court that at the trial plaintiff made no attempt, in her case in chief, to show that the land was not worth what she paid for it. She based her contention that the land was sold to her by the acre and because every acre of the 600 was not worth $125 she was damaged by the difference between that sum and what it was worth, it making no difference if 300 acres was worth $300 per acre. It was only in rebuttal that she endeavored to show that the land was worth less than $75,000, and objection was made by defendants to all testimony so offered on valuation. This testimony was taken before a Commissioner and, of course, our objections have never received a ruling. We presume that the trial court, concluding that this evidence should have been offered by her in her case in chief, disregarded the testimony when it was put in rebuttal. However, if such was not the case, the most that can be said on this point is that there was a conflict in the testimony and the judgment should not be disturbed.

At page 14 of the reply brief of counsel for plaintiff, he attempts to state the reason why the matters contained in the amendment to the complaint were not embodied in the several complaints filed by plaintiff in the different State courts in which she commenced actions. We don't know where he obtained the idea of "local preju-

dice." It is a statement of counsel not warranted by any evidence in the case. Notwithstanding the attempted explanation of counsel, we still do not understand why the alleged facts embodied in the amendment were not pleaded in the other suits or in the original complaint in this action. These alleged facts were as well known to plaintiff when she commenced her action in rescission as they were when she filed her amendment and we are unable to see what "local prejudice" had to do with them.

At the bottom of page 14 of the reply brief of plaintiff we find the following statement:

"However, after the trial court allowed the defendants to put in testimony of witnesses that the land in its entirety was worth all that plaintiff paid for it, we filed with the Clerk of the District Court an offer in writing to the effect that in the event of a judgment for the plaintiff the defendants could take back the land in lieu of paying the judgment. It should be remembered that the plaintiff, before commencing her action in the State Court, had offered the land back to the defendants, and the defendants refused to take back the land. The written refusal of defendants to rescind is in evidence among the exhibits in this case."

Counsel has gone entirely outside of the record in making the above statement. The record does not even refer to it in any place. Evidently it was made for some purpose, and the only reason for making it must have been for the purpose of effect upon this Court. Under the circumstances we feel at liberty to quote the full offer referred

to by counsel as contained in the transcript of the testimony of the trial. It may be found in Volume Six, page 398 of the Reporter's Transcript and is as follows:

Mr. Macomber: If your Honor please, while we are waiting for the witness to come in, the witness Silva testified yesterday that that land outside was worth $250 an acre with an expenditure of $60 an acre for clearing. Now, I have got here a deed from the plaintiff to the Scheibers, which I am going to leave with the clerk, to all that land, all the land outside the levee, if judgment should be rendered in this case in favor of the plaintiff for which she prays in full and it is paid within 60 days after judgment is entered, I instruct the clerk to deliver this deed from the plaintiff to the defendant, of all the land on the outside of the levee.

Mr. Miller: How much will the plaintiff take for the land now?

Mr. Macomber: We will sell the land today for $75,000, after she has paid the $21,000 on it.

Mr. Miller: You are sure you will take $75,000 for the ranch as it stands today?

Mr. Macomber: Yes.

Mr. Hewitt: I am sorry you did not make the offer yesterday. I do not think there would have been any necessity to pursue this case any further, if that is the case.

Mr. Macomber: Of course, that has nothing to do with the finishing of the case.

The Court: If you can settle it, certainly it

would relieve the court of a great deal of trouble.

Mr. Hewitt: If the offer had been made yesterday, the cash would have been turned over.

The Court: Of course, that is something the court has nothing to do with at all, except that if you settle the case it relieves the court of a great deal of trouble.

Mr. Miller: Does that mean settlement of the whole thing?

Mr. Macomber: That has nothing to do with this case. The gentleman testified yesterday he was willing to give $75,000 for the ranch would certainly be not concerned with any discussion between these parties in this court; he said he would give $75,000 for this ranch; if he will do that, let him come through with his money.

Mr. Hewitt: Do you mean $75,000 clear of encumbrance?

Mr. Macomber: $75,000 as it is now. We will discuss this thing after court adjourns.

Mr. Hewitt: I would like, as long as counsel has made the statement, to have the matter presented so that the court may understand what his offer is. Do you mean $75,000—

Mr. Macomber: We will discuss it after court adjourns, we will take it up; I think that will be more appropriate than making the courtroom a real estate office

Mr. Hewitt: I would like to know whether you make the offer in court to sell that land for $75,000 free of encumbrance as it now stands?

Mr. Macomber: If your Honor please, I would like to take this matter up with Mr. Hewitt after the court adjourns.

Mr. Hewitt: Then I presume your offer is withdrawn for the present?

Mr. Macomber: We will take the matter up after court adjourns and if this gentleman wants to pay $75,000 for this place as it is now, he is on.

Mr. Hewitt: I understand counsel to say that the offer is made subject to his right to recover whatever he is entitled to in this action; that the offer has nothing whatever to do with his right to prosecute this to judgment.

The Court: The offer will be ignored by the court entirely.

It is true that the plaintiff offered the land back to the defendants. She did this according to the record on March 11, 1912, some four and one-half months after she took possession of the property. The agreement to purchase set forth in the answer included the personal property on the ranch as well as the ranch, and she bought and took possession of both. In her offer to return the ranch she did not include the personal property and it is not surprising that the defendants refused to accept her offer.

No findings were made by the trial court in this action, as it was not requested to make findings. In the absence of findings the judgment of the trial court must be approved unless there was apparent error committed.

In case a decision has been rendered by a trial

court in cases where the evidence is conflicting. such decision is binding and conclusive.

"The conclusion of a trial judge on a question of fact, based on evidence taken before him, is entitled to great weight and will not be reversed unless there is a decided preponderance of evidence against it."

*Pugh* v. *Snodgrass,* 126 C. C. A. 251

"Findings of the trial judge on conflicting evidence will not be disturbed on appeal unless overborne by the clear weight of the evidence as disclosed by the record."

*Carey* v. *Donohoe,* 126 C. C. A. 254.

"Where an action at law is tried to the court and a jury is waived, the court's general finding stands as the verdict of the jury and may not be reviewed unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or on a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial."

*Pennsylvania Casualty Co.* v. *Whiteway et al.* 127 C. C. A. 332.

"A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury."

*American Mfg. Co.* v. *Moslanka,* 121 C. C. A. 589.

"The decisions of questions of fact upon the weight of conflicting evidence in the trial of an action at law without a jury are not reviewable in the national courts."

*Busch et al.* v. *Stromberg-Carlson Tel. Co.* 133 C. C. A. 244.

"Where an action is tried to the court without a jury, the court's finding, whether general or special, performs the same office as the verdict of a jury."

*Seep* v. *Ferris-Haggarty Copper Mining Co.* 120 C. C. A. 191.

"In an action at law tried to the court, findings on facts are conclusive on appeal."

*Los Angeles Gas & Elec. Co.* v. *Western Gas Const.* 124 C. C. A. 75.

"Where an action in the federal court is tried by the judge his findings of fact are conclusive in the appellate court unless there is no evidence to support them."

*Washington & Canonsburg Ry. Co.* v. *Murray,* 128 C. C. A. 112.

In this case there was abundant evidence to support the decision of the trial court. The evidence of plaintiff on every material issue was controverted by the evidence for the defendants, yet notwithstanding the law as laid down in the foregoing decisions, plaintiff asks this Court to set aside the judgment, because, as she affirms, the decision is unsupported by the evidence.

Evidently the trial judge concluded that the ranch was sold en masse and it was worth all the plaintiff paid for it. True, some of the land was of but little value, but a large portion of the place was worth from $250 to $300 per acre according to the testimony. Plaintiff was not damaged to any extent. She could have disposed of the land at the same price she paid for it immediately after she bought it.

In plaintiff's case in chief no attempt was made

by her to prove the value of the good land. It would have been impossible for the trial court to pronounce judgment in her favor for any amount on the evidence offered by her. Our motion for a non-suit which is shown at page 279 of the transcript should have been granted because of the fact that plaintiff had shown no damage.

It was granted in the personal property suit which was consolidated and tried with this one (See page 284 of Trans.).

Counsel for plaintiff in his reply brief still adheres to his claim that Dr. Ramos, the agent for plaintiff, was bribed. For what was he bribed? She obtained full value for her money and it was immaterial to the defendants whether she took the place or not. On this point we are content to rest the case on the argument made in our first reply brief (See page 62 and following).

Finally, as stated by us in our oral argument, plaintiff is seeking to obtain a ranch valued at $75,000 for some $43,000, and when the trial court refused to assist her she came to this Court upon a conflict of evidence and upon an unjust claim and seeks to have the decision set aside.

We again affirm that the judgment should be approved.

A. H. HEWITT,
*Attorney for Defendants in Error.*

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*Personal service of the within brief is hereby admitted this ..... day of March, 1917.*

LLOYD MACOMBER,
*Attorney for Plaintiff in Error.*